JOHN N. THACKER
EUGENE THACKER
v.
BUREAU OF LAND MANAGEMENT

IBLA 85-505 Decided April 23, 1986

Appeal from a decision of Administrative Law Judge E. Kendall Clarke finding the method of impoundment of domestic horses was appropriate, and costs incurred and assessed were reasonable and justified. N2-83-2 and N2-83-3.

Affirmed in part.

1. Grazing Permits and Licenses: Trespass--Trespass: Measure of Damages--Wild Free-Roaming Horses and Burros Act

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

APPEARANCES: John M. Thacker and Eugene Thacker, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

John M. Thacker and Eugene Thacker appeal from a decision of Administrative Law Judge E. Kendall Clarke, dated March 7, 1985, upholding the manner of a Bureau of Land Management (BLM) impoundment of appellants' horses and upholding the costs BLM incurred and assessed as reasonable and justified.

On February 9, 1983, BLM impounded horses belonging to appellants after determining the horses were in trespass. Appellants objected to the manner of impoundment and appealed the assessment of impoundment charges. Administrative Law Judge E. Kendall Clarke held a hearing on the consolidated appeals (N2-83-2 and N2-83-3) on April 10, 1984.

After review, we find Administrative Law Judge Clarke has presented an accurate summary of facts of the case. His decision is appended to this opinion as Appendix A and hereby incorporated as a part of this decision.

The following regulations in 43 CFR 4150 are applicable to this decision:

> § 4150.2 Notice and order to remove.
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> (b) When neither the owner of the unauthorized livestock nor his agent is known, the authorized officer may proceed to impound the livestock under § 4150.4.
>
> § 4150.4 Impoundment and disposal.
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> Unauthorized livestock remaining on the public lands or other lands under Bureau of Land Management control, or both, after the date set forth in the notice and order to remove sent under § 4150.2 may be impounded and disposed of by the authorized officer as provided herein.
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> § 4150.4-1 Notice of intent to impound.
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> * * * * * * *
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> (b) Where the owner and his agent are unknown, or where both a known owner and his agent refuse to accept delivery, a notice of intent to impound shall be published in a local newspaper and posted at the county courthouse and a post office near the public land involved. The notice shall indicate that unauthorized livestock on the specified public lands or other lands under Bureau of Land Management control, or both, may be impounded any time after 5 days from publishing and posting the notice.

The procedure for determining the settlement amount is set forth in 43 CFR 4150.3:

> § 4150.3 Settlement.
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> The authorized officer shall determine if the violation is nonwillful, repeated nonwillful, willful, or repeated willful. * * * The amount due for all settlements shall include: the full value for all damages to the public lands and other property of the United States; all expenses incurred by the United States including those incurred in gathering, impounding, caring for, and disposing of livestock in cases which necessitate impoundment under § 4150.4; and shall include the amount due the United States for unauthorized grazing use as described in paragraphs (a), (b) or (c) of this section.
>
> (a) For nonwillful violations: The value of forage consumed as determined by the average monthly rate for pasturing livestock on privately owned land (excluding irrigated land) for the 11 Western States as published annually by the Department of Agriculture.

In their statement of reasons, appellants assert the Administrative Law Judge's decision was not supported by the record. Appellants argue that an Administrative Law Judge has a special duty to "fully ventilate and adduce all relevant facts of the case," using his own expertise, on behalf of individuals who are untrained and unfamiliar with the law. They also "contend that to the extent that the record is deficient, a modest degree of inquiry by the court would have developed the record sufficiently to expose the reckless activity of the respondent."

[1] Appellants argue that the Administrative Law Judge has an additional responsibility to develop the facts of the case if an appellant is not represented by counsel. 1/ The Board is aware of appellants' election to appear at the hearing without aid of professional counsel. Appellants were given adequate notice of and appeared at the hearing and were advised as to the handling of cross-examination and presentation of evidence. They were able to present evidence on their own behalf and to cross-examine witnesses for the Government. See United States v. Burt, 59 IBLA 326, 335 (1981). It was obvious from the record that appellants were not hampered by restrictions regarding introduction of evidence and testimony which might have been imposed had they been represented by counsel. In addition, Judge Clarke afforded appellants a period of time following the hearing to submit additional briefs in support of their case. Appellants were clearly afforded ample opportunity to present their case. We cannot now justify another hearing.

We have examined the record, de novo, to determine if the record justifies a finding that BLM was, in fact, "reckless" or the costs imposed were excessive. Appellants objected to the cost of a helicopter roundup. The charges were apportioned on a per-animal-captured basis, and the costs assessed were admittedly higher because some of the trespassing animals being pursued escaped to private land. However, as an offset, BLM elected to absorb a number of costs which could have been charged.

BLM set out to capture trespassing stock thought to belong to a chronic offender. When BLM captured the trespassing animals, the Thackers' horses were included. The Thacker horses were admittedly in trespass, and the regulations make the consequences clear.

Provided the decision was not unreasonable, we will not second guess the BLM staff regarding the method chosen to capture trespassing animals. A helicopter, a horseback roundup, or (as advanced by appellants) a pan of grain may all have been successful methods for capture of the trespassing

1/ We note that Judge Clarke did examine witnesses himself to clarify factual matters. He ascertained impoundment charges (Tr. 51) and the inability to read the horses' brands from a distance (Tr. 63). He also asked John Thacker about notification of possible owners of trespassing animals (Tr. 81) and asked counsel for BLM how these horses were identified (Tr. 82). In a lengthy exchange, Judge Clarke asked witness Mr. Boyles to distinguish ponies, (domesticated) horses and mustangs, and the importance of the distinctions (Tr. 61-63).

horses. We cannot find a basis in the record for a finding that the decision to use the helicopter was unreasonable. Had BLM tried to gather the horses another way and then failed, requiring the use of a helicopter on a subsequent attempt, the cost would probably have been greater. It appears the helicopter offered the greatest probability of success on the first try.

The evidence in the record before us establishes that BLM acted reasonably and in accordance with the regulations. The record does not indicate that BLM acted in a reckless manner, given the lack of knowledge of ownership of or the degree of domestication of the trespassing animals, and the field conditions at the time the horses were impounded. There is no evidence that the course of action was chosen for the purpose of incurring higher costs to be passed on to appellants. Rather, the roundup method was chosen because of the belief that, under the circumstances, the probability of success would be greatest. We must agree with Judge Clarke's decision.

We have also reviewed the costs imposed (Exh. 10). As previously noted, some of the costs incurred were not charged to appellants (Tr. 46-48, Exh. 11). We see no reason to adjust the costs either up or down.

If a decision rendered by an Administrative Law Judge is reasonable, appropriate, supported by the record, and comports with the applicable regulations the decision will not be modified on appeal. The record contains no basis for the Board to substitute its judgment for that of Judge Clarke. See Bureau of Land Management v. Holland Livestock Ranch, 54 IBLA 247, 255 (1981) and cases cited.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Clarke is affirmed and adopted as part of this decision.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

John H. Kelly
Administrative Judge

APPENDIX A

March 7, 1985

JOHN N. THACKER, Jr. and EUGENE THACKER, Appellants	:	N2-83-2 and N2-83-3
v.	:	Appeal of Impoundment Action Dated February 9, 1983
BUREAU OF LAND MANAGEMENT, Respondent	:	

DECISION

Appearances: Burton J. Stanley, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for respondent; John N. Thacker, Jr., Imlay Nevada, pro se; and Eugene D. Thacker, Imlay, Nevada, pro se.

Before: Judge E. Kendall Clarke

The captioned cases which were consolidated for hearing arise out of the same impoundment action by the Bureau of Land Management of horses which were found to be in trespass within the Humboldt Valley Allotment located in the Paradise Denio Resource Area in the State of Nevada. The appellants have appealed the reasonableness of the impoundment charges for which they were billed in connection with the trespass of [horses] belonging to each of them.

The hearing on the consolidated appeals was held in Winnemucca, Nevada on April 10, 1984.

The Management Framework Plan for the Paradise Denio Resource Area provided that licensed domestic horses and burros were to be permitted only in those areas where such domestic animals would not be expected to mix with populations of wild horses and burros (Ex. 8). Because the Humboldt Valley

Allotment was a wild horse range no domestic horses or burros were licensed for the area. The land in question is shown on Exhibit 2, 50 percent of which is public domain. The land under private ownership is mostly under exchange of use giving the BLM control for management purposes. Eugene Thacker is licensed to run cattle in the Humboldt Valley area from June 1 of each year. A copy of his license is Exhibit 3. John Thacker is not licensed to graze livestock within the Humboldt Valley Allotment. Neither have authority to run domestic horses on the public lands within this allotment. John Thacker is a permittee, however, within the Sonoma-Gerlach Resource Area.

The Paradise Denio Resource area manager, David Griggs testified that he first became aware of the domestic horse trespass on the public lands in Humboldt Valley Allotment on February 3 and 4, 1983. This was reported to him by his horse wrangler and range technician, Dave Boyles. Mr. Boyles reported having observed seven head of horses, six ponies, one mare and a colt. Since the ownership of the horses that were in trespass was unknown Mr. Griggs decided to take an impoundment action, a procedure not generally used but because of repeated problems of trespass in the area it was deemed to be appropriate (Tr. 13). It was his opinion that the most appropriate way to carry out the impoundment was with the use of a helicopter. He obtained the consent of his superiors in the Washington, D.C. office for the use of a helicopter in carrying out the impoundment and began the action on February 9. Since they did not know the identity of the horses (they had tried to read the brands prior to the impoundment action but were unable to do so) or their owners, notification was carried out by publication in the newspaper and posting in the post office (Ex. 5).

Mr. Dave Boyles who was called as a witness by the Thackers testified that he first noticed the horses on the 3rd of February (Tr. 54). He made an attempt to find out whose horses they were. He tried using a spotting scope from a distance. The ground was pretty soft where the horses were and he was afraid of getting stuck with the pickup if he got any closer. The next day he was back in the area and the horses were still there. He reported to his office that there was no way to gather the horses by horseback (Tr. 56). He stated that after looking at the horses in a corral up close he was sure that even if he had been able to drive up to them in the mud and gotten closer he would have been able to read only one or two or possibly three of the brands.

Mr. Robert Smith who is a range conservationist for the Bureau of Land Management in the Winnemucca District testified that there were seven people helping him on the impoundment plus one helicopter. Exhibit 10 is the list for the cost of impoundment. They have been broken down and split up for each owner whose horses were impounded, Mr. McNinch, Mr. Eugene Thacker and Mr. John Thacker. After the horses were captured

and taken to an impoundment at the Sonoma ranch they were shaved by George Giacometto a brand inspector who made a positive identification on February 14. The BLM was unable to capture some of the horses that ran through a fence to private ground during the capture procedure (Tr. 23-24). Mr. Eugene Thacker paid an impoundment charge of $ 1,037.07 under protest. John Thacker's charges were $ 1,214.28. This included a longer period of feed and yardage since Eugene Thacker picked up his horses but John Thacker's horses stayed at the Sonoma ranch for four days. In accordance with the BLM procedure since John Thacker's charges were not paid his horses were sold at auction leaving a remaining amount of $ 255.61.

Both John Thacker's and Eugene Thacker's position appears to be that the Bureau of Land Management officials used poor judgment in incurring the expense of a helicopter to round-up horses which turned out to be domesticated and in their opinion could have been captured by using a pan of grain. They further take the position that insufficient effort was made to identify the horses. It is their opinion that Boyles did not make a sufficient effort to get close enough to the horses to read the brands. They contend that had they been notified they would have picked up the horses and thus avoided the problems and costs of impoundment.

Regulation 43 CFR 4150.2(b) provides that when neither the owner of the unauthorized livestock nor his agent is known, the authorized officer may proceed to impound the livestock under Section 4150.4. Regulation 43 CFR 4150.4-1(b) provides where the owner and his agent are unknown or where both a known owner and his agent refuse to accept delivery, a notice of intent to impound shall be published in a local newspaper and posted at the county courthouse and post office near the public land involved. The notice shall indicate that the unauthorized livestock on the specified public lands or other lands under Bureau of Land Management control or both may be impounded anytime after five days from the publishing and posting the notice.

There is no question here about the fact that the appellants' horses were in trespass on public land. An experienced horse wrangler testified that he was unable to read the brands and that in his opinion he could not have gotten close enough to the horses in trespass to determine their ownership. In fact, after they were captured he realized that if he had gotten up close to the horses he still would have only been able to read the brands on a very few. The evidence further shows that attempts to capture domestic horses in this area before by the use of horseback had been unsuccessful. In a judgment of the officials charged with carrying out the grazing regulations within the area in question the use of a helicopter was necessary to roundup the horses involved considering the weather, condition of the field and unknown nature of the horses. The specialist in the Washington, D.C. office agreed

with their assessment. There is nothing in the record to show that use of the helicopter was unreasonable except the testimony of the Thackers that the horses could have been captured with a pan of grain. This testimony of course has the advantage of hindsight. When they testified the Thackers knew whose horses they were and what their propensities were. That however is insufficient to meet the burden of showing that the use of the helicopter was unreasonable.

I, therefore, find that the preponderance of the evidence received in this appeal shows that the means used to impound the horses on the Humboldt Allotment was appropriate and the costs incurred were reasonable and justified. I, therefore, find that the impoundment costs assessed against Eugene Thacker for $ 1,037.07 was proper and I uphold the District Manager's decision in this regard.

I further find that the assessment charges against John Thacker of $ 1,214.28 for impoundment and sale were properly incurred and reasonable under the circumstances and that after deduction of the proceedings received at the sale John Thacker owes the Bureau of Land Management $255.61 in connection with the impoundment and sale.

E. Kendall Clarke
Administrative Law Judge

APPEAL INFORMATION

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The name and address of the adverse party to be served with a copy of the notice of appeal and other documents appears below. Additionally, rules that became effective September 24, 1980, state that, the Regional (or Field) Solicitor of the Department of the Interior must be served with a copy of the notice of appeal and any statement of reasons, written arguments, or briefs.

Distribution attached.